

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

***IN RE: REALPAGE, INC., RENTAL
SOFTWARE ANTITRUST LITIGATION
(NO. II)***

**Case No. 3:23-MD-3071
MDL No. 3071**

This Document Relates to:

3:22-cv-01082

3:23-cv-00357

3:23-cv-00332

3:23-cv-00410

3:23-cv-00742

Chief Judge Waverly D. Crenshaw, Jr.

**DEFENDANTS' RESPONSE TO PLAINTIFFS'
NOTICE OF SUPPLEMENTAL AUTHORITY [DKT. 646]**

Plaintiffs' Notice of Supplemental Authority regarding the recent decision *In Re: Marriott Int'l Customer Data Sec. Breach Litig.*, No. 19-MD-2879, 2023 WL 8247865 (D. Md. Nov. 29, 2023) improperly characterizes that case. The *Marriott* decision can easily be distinguished, and the Court should therefore disregard Plaintiffs' Notice.

First, the holding in *Marriott* turned on the fact that defendants had *waived* their right to enforce the class action waiver at issue by waiting to raise it until class certification. 2023 WL 8247865 at *4–5, 8. Plaintiffs have not argued waiver here. Unlike in *Marriott*, Defendants here have asserted the class waivers from the start. Mem. at 1, n.1 [Dkt. 591]. *Marriott* supports the timing of Defendants' motion.

Second, in *dicta*, the *Marriott* court noted its “reservations” about the parties’ “Choice of Law and Venue” provision, largely based on its unique terms. 2023 WL 8247865, at *5–7. That provision differs markedly from the class waivers here. The *Marriott* waiver provision found in the choice of law and venue section restricted a *court* from adjudicating claims as a class; it did

not prohibit *plaintiffs* from bringing class actions. 2023 WL 8247865 at *4, 7 (explaining the provision at issue “seeks to limit this Court’s own authority” and “[r]ather than referencing the parties, this provision purports to control the court’s management of the litigation, i.e. will be handled individually”). The *Marriott* provision “prohibits any collective handling of the claims, including by class action. It is not merely a class action waiver.” *Id.* at *5. Here, the Subject Plaintiffs explicitly agreed *not to bring class action claims*. Unlike the *Marriott* waivers which were buried in a choice of law and venue provision, the waivers here say nothing of the Court’s authority. Exhibit 1-A at 45 (Watters) [Dkt. 590-1]; Exhibit 2-A at 56, 98, 142 (Weaver) [Dkt. 590-2]; Exhibit 3-A at 38 (Kabisch), 169 (Cherry f/k/a Christopher Berg) [Dkt. 590-3]; Exhibit 4-A at 15, Exhibit 4-B at 24, Exhibit 4-C at 27 (Vincin) [Dkt. 590-4]. Moreover, unlike the *Marriott* provision that was “buried” in the contract, 2023 WL 8247865 at *4, the majority of the class waivers were prominently featured in sections titled “Class Action Waiver” in the agreements Subject Plaintiffs entered.¹

Third, Plaintiffs rely on selective quotes from Judge Bailey’s *Marriott* decision to support their position but fail to mention that the quoted portions of his opinion come from *Martrano v. Quizno’s Franchise Co., L.L.C.*, No. 08-cv-932, 2009 WL 1704469, at *20–21 (W.D. Pa. June 15, 2009), an outlier case Plaintiffs already cited in their Opposition. As explained in Defendants’ Reply, *Martrano* is an outlier, as two federal courts enforced under Colorado law the same class waiver from *Martrano*. Reply at 4, n.7. *Marriott* adds nothing new.

¹ All waivers included bolded, underlined, and/or italicized language, the majority in all capital letters, to draw attention to the class waiver provisions. Exhibit 1-A at 45 (Watters) [Dkt. 590-1]; Exhibit 2-A at 56, 98, 142 (Weaver) [Dkt. 590-2]; Exhibit 3-A at 38 (Kabisch), 169 (Cherry f/k/a Christopher Berg) [Dkt. 590-3]; Exhibit 4-A at 15, Exhibit 4-B at 24, Exhibit 4-C at 27 (Vincin) [Dkt. 590-4].

Finally, the Fourth Circuit’s pre-remand opinion in *Marriott* explains the effects of a class waiver and reinforces that Defendants’ Motion should be granted. Without addressing the validity of the waiver at issue, the Fourth Circuit recognized that “by signing a valid and enforceable class waiver, as alleged here, a plaintiff promises not to cross that line – to give up, in exchange for some contractual benefit, the right to proceed by way of an ‘actual class action.’” *In re Marriott Int’l, Inc.*, 78 F.4th 677, 686 (4th Cir. 2023). In doing so, the Fourth Circuit relied on cases Defendants cited in Defendants’ brief. *See* Mem. at 12 n.11 (collecting cases enforcing standalone class waivers); Mem. at 20 (citing *Lindsay v. Carnival Corp.*, 2021 WL 2682566, at *4 (W.D. Wash. Jun. 30, 2021) and *Laver v. Credit Suisse Sec. (USA), LLC*, 976 F.3d 841, 846 (9th Cir. 2020)).

This Court should enforce the terms of the class waivers as written—leaving intact the line which the Subject Plaintiffs promised not to cross.

Dated: December 4, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record registered on the CM/ECF system.

DATED this 4th day of December, 2023.

/s/ Ryan Holt

Ryan Holt